

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

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IN THE MATTER OF

PROVIDENCE SCHOOL DEPARTMENT

CASE NO.: EE-3660

-AND-

RI COUNCIL 94, AFSCME, AFL-CIO

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**DECISION AND DIRECTION OF ELECTION**

The above matter came on to be heard on a "Petition by Employees for Investigation and Certification of Representatives" (hereinafter "Petition") filed by RI Council 94, AFSCME, AFL-CIO (hereinafter "Petitioner" or "Union") on September 12, 2002, wherein the Petitioner sought to represent the Substitute Clerks of the Providence School Department (hereinafter "Respondent" or "Employer"). The Petition was accompanied by signature cards, which if verified were sufficient in number to warrant the conducting of an election. Additional cards were submitted on several occasions after the filing of the Petition. In total, thirty-six (36) cards of interest were submitted and thirty-one (31) were verified.

An informal hearing on the Petition was conducted by the Board's Investigative Agent on October 22, 2002, which was attended by representatives of both the Employees and the Employer. After the informal hearing failed to produce a Consent Agreement for Election, the matter proceeded to a formal hearing, which was conducted on January 23, 2003.

**FACTUAL SUMMARY**

The Providence School Department has a classification of employees known as "Substitute Clerks," who are utilized by the Department for three purposes:

1) Special Projects: Temporary assignments to accomplish a specific task, such as a six (6) week project to update files. Upon completion of the task, the employment would end. This type of situation is "rare", according to Mr. Don Zimmerman, the Senior Executive Director of Human Resources. (TR. p. 66)

2) Vacancies: To fill job openings which occur as a result of the posting, bidding and recruitment process. These "vacancies" vary in length, with some as short as two months (TR. p. 67), and some as long as a year or more. (TR. p. 34, 35)

3) Absences: To fill in and provide coverage for regular employees who are absent for whatever reason - illnesses, bereavement leave, maternity leave, worker's compensation leave, or

for other reasons. (TR. p. 69) The duration of each particular assignment varies with the nature of the type of absence, although many are of a significant length of time. (TR. p. 69)

The Union presented four (4) witnesses who testified about the nature and scope of their employment as substitute clerks. The first witness, Ms. Fabiola Delgado, has been employed as a substitute clerk since September 11, 2000. (TR. p. 8) Her duties include typing, answering questions, making telephone calls, and coordinating police, ambulance, and medical calls (if necessary). (TR. p. 8-9) Ms. Delgado works five (5) days per week, eight (8) hours a day, on average. (TR. p. 9) At the time of the formal hearing in this matter, Ms. Delgado had been working at Hope High School, as a substitute clerk, for (1) one year. (TR. p. 10) Ms. Delgado testified that she performs the same type of work as the "regular" permanent clerks, and that she works side by side with these other clerks, in the same office. (TR. p. 11) The regular and substitute clerks all have the same supervisor, and they report to the same workplace each day (TR. p. She testified that, when a work assignment or location is changed, she is notified by her supervisor. She does not receive daily phone calls from the supervisor telling her to report to the same location the following day. (TR. p. 12) Ms. Delgado testified that she receives a lay-off letter each June, which indicates that she is a ten (10) month employee, and that she will be called back to work on an as needed basis. (TR. p. 15, 21) Ms. Delgado also testified that when she completed the 2001-2002 school year, her supervisor told her to expect a call for the following school year. When Ms. Delgado hadn't heard anything by late August, she phoned her supervisor, who indicated that she had forgotten to call Ms. Delgado, but that her services were still needed at Hope High School, where she had been assigned since January, 2002. (TR. p. 17) Prior to her tenure at Hope High School, Ms. Delgado also worked as a substitute clerk in various other locations within the Providence School system. (TR. p. 19)

The Union also presented the testimony of Victoria Medina, who has been employed as a substitute clerk since 1999, with the exception of a year that she took off for a maternity leave. (TR. p. 35) She testified that her supervisor, Ms. Charlene Villa, had told her that anytime she wanted to come back, there would be a job for her. Upon the conclusion of her maternity leave, she did call, and she was put back to work. (TR. p. 36) At the time of the formal hearing in January, 2003, Ms. Medina had been working at Central High School since September, 2002 (TR. p. 36) Ms. Medina also testified that she performs the same type of work as the other "regular" clerks, and that she works the same hours, and that they all have the same supervisor.

(TR. p. 37) Ms. Medina testified that she works forty (40) hours per week, and makes \$7.65 per hour, and that one of the clerks she works with told her that she makes \$600.00 every two weeks.

(TR. p. 43) Ms. Medina testified that one year, she even worked through the summer. (TR. p.

**38)** Ms. Medina also testified that most of her work assignments have been long-term, and that her supervisor only calls her when there is a re-assignment; she is not called on a daily, weekly, or even monthly basis to report to work. (TR. p. 39)

The third witness to testify for the Union was Ingrid Emeterio, a substitute clerk since **May, 1999. (TR. p. 43)** She works forty (40) hours per week, and has been working continuously since May, 1999. (TR. p. 44) One of her assignments, at Classical High School, lasted an entire school year. (TR. p. 45) Like the other witnesses, Ms. Emeterio receives her assignments from Ms. Villa. (TR. p. 47) She also receives the “lay-off” letter at the end of each **school year. (TR. p. 47)**

The final Union witness was Wendy Burrell, who began working as a substitute in 2000. (TR. p. 50) Her duties include typing bulletins, letters, memos, answering phones, keeping an eye on kids until they are picked up, and assisting the principal. (TR. p. 50) Ms. Burrell testified that the “lay-off” letter was given to show that employees were not guaranteed a summer job, but that she was always fortunate enough to land a summer job. (TR. p. 51) She also testified that she works forty (40) hours per week and that, she receives the same pay as the other substitute clerks, and works under the same working conditions. (TR. p. 51) **She testified that when she** was completing an assignment, Ms Villa would call her at the end and would tell her what her next assignment was going to be, and where to report for work. (TR. p. 53)

### **DISCUSSION**

Under Rhode Island law, certain full-time and part-time municipal employees are permitted to engage in collective bargaining. R.I.G.L. 28-9.4 et seq. Excluded from participating in collective bargaining are “casual employees”, meaning “those persons hired for an occasional period to perform special jobs or functions”. R.I.G.L. 28-9.4-2 (b) (5). **Therefore, the primary question before the Board is whether or not the “substitute clerks” in the Providence School Department are “casual” employees. If so, they are not permitted to engage in collective bargaining, and the petition must be dismissed. If however, the Board determines that the employees are not “casual” employees, the Board must then address the question of whether or not the employees share a “community of interest” sufficient for creating a bargaining unit.**

Since the issue of whether the employees meet the statutory definition of “casual” is potentially dispositive, we shall address that question first.

The Union, in this case, argues that the definition of “casual employee” set forth by R .G.L. 28-9.4-2 is restrictive, and recognizes that employees hired under the Employer’s need for assistance with “Special Projects” could be fairly characterized as “casual”. The Union notes, however, that the Employer acknowledged that these circumstances are extremely rare. The Union argues that a review of the employment records produced by the Employer for the six (6) month period, in this case, reveals a continuous and long-term employment of substitutes - whether the substitutes are in one position or a series of positions, thus negating any suggestion that the substitute clerks are employed “for an occasional period”. The Union also argues that the witness testimony also revealed a pattern of continuous year-to-year employment, which also negates the allegation that the employees are hired on either a temporary basis, or for an occasional period.

The Employer argues that the testimony of the four (4) Union witnesses established that these employees work only on an as-needed, fill-in basis for positions that are temporarily vacant, and that their employment is not permanent in nature. The Employer also argues that the employees are “on call” employees, with definite and specific dates of termination regarding their individual assignments. The Employer argues that, when a “vacancy is filled, the substitute clerk ends her position with the Department;” and that if a clerk is given a new assignment, “it is at the need or discretion of the Department.” (Employer Brief p. 3) In short, the Employer argues that the substitute clerks are persons hired for an occasional period to perform special jobs or functions; and thus, are excluded from collective bargaining as casual employees.

The documentary evidence, in this case, established that for the twenty-five (25) week period from September 6, 2002, through February 21, 2003, a total of sixty-eight (68) persons worked at one point as a Substitute Clerk in the Providence School Department. (Appendix B of Union Brief) Of these sixty-eight (68), fifteen (15) persons completed their assignments within the first four weeks of school – most of these fifteen (15) worked as substitutes for only two (2) weeks. A few additional employees worked sporadically over the twenty-five (25) week period. [Nelson Cruz – six (6) weeks, Patricia Smith – three (3) weeks] A few employees worked for a few to several consecutive weeks in the second semester, through the date of the document provided by the Employer. Of the remaining employees, twenty-nine (29) of them worked for

more than twenty (20) weeks Fourteen (14) employees worked between ten (10) and twenty (20) weeks

While a few of these employees could be defined as “casual employees” - hired for an occasional period to perform special jobs or functions, the majority of the substitute clerks can be characterized more accurately as long-term substitutes or “floaters,” who move from one long-term or short-term assignment to another on a mostly continuous basis. When an employee completes a particular assignment, or when the assignment is coming to an end, the Chief Clerk calls the employee with a new assignment. The Board finds that substitute clerks who have had a long-term employment with the Department clearly have not been hired for an occasional period to perform a special job or function.

As further support for this determination, the Board also relies upon Employer’s Exhibit #1, the “lay-off” letter, so-called. This document, which was submitted as an example of the letter which all the substitutes receive indicates that the employee is “working on a ten (10) month schedule on an as need basis.” The document, dated June 5, 2002, also indicates that the employee’s last scheduled day of work is June 29, 2002 and that his or her last paycheck will be issued on July 5, 2002. Moreover, the letter goes on to state: “Please note that this employee is between terms and will be returning in September as a clerical substitute on an as need basis.” This document, coupled with the testimony of the four (4) witnesses leads to the inescapable conclusion that clerical substitutes are hired for a ten (10) month period, to work on an as-needed basis. Moreover, the documentary evidence established that the majority of the employees the Union seeks to represent (Appendix C to Union Brief, and personnel records submitted after the hearing by the City of Providence) worked nearly every school week since the beginning of the academic year.<sup>1</sup>

The only real dilemma presented to the Board, in this case, is try to establish a “bright line” rule for the employer to understand when a substitute clerk has ceased to be a casual employee and crossed the line into a long-term substitute. Pursuant to R.I.G.L. 28-9.4-2, the Board is charged with determining whether an employee is a casual employee. The definition of casual employee set forth in R.I.G.L. 28-9.4-2 (b) (5) is silent on how to measure the time-frame by which an employee shall be considered casual. Indeed, the number of weeks that an employee works for one employer may not be dispositive in another case. In this case, however.

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<sup>1</sup> Most did not work the two (2) week Christmas break.

it is clear that substitute clerks are being hired for long-term arrangements, year after year, to fill a continuous need for clerks. The Employer routinely issues a summer lay-off letter that indicates that the person is entitled to re-employment in the following academic year, thus negating the employer's claim that these employees don't enjoy some protected status. The danger, in such a seemingly permanent situation for employees, is that the Employer manages to escape paying wages and benefits comparable to their "permanent" employees.<sup>2</sup> In determining a cut-off for the number of weeks of work that will qualify an employee as casual, the Board also looks to the definition of "seasonal" employees contained in the municipal bargaining statute for additional guidance. Seasonal employees are those who perform work on a seasonal basis of not more than sixteen (16) weeks, or who are part of an annual job employment program. Thus, it seems clear that substitute clerks who work sixteen (16) or more weeks aren't seasonal. The Board does not believe that they are casual either, especially because they are specifically hired for a ten (10) month period, to work on an as-needed basis.

In this case, the Board notes that there were several clerks who worked for a two (2) to four (4) week period at the beginning of the school year, and a few clerks who worked sporadically throughout the year. The Board finds that these employees are fairly characterized as casual, and thus are excluded from the process of collective bargaining. The Board finds, however, that substitute clerks who have worked for the Providence School Department for a term of sixteen (16) weeks or longer, during an academic year, are more fairly characterized as long-term floater substitutes, and are no longer "casual" employees. Therefore, the Board finds substitute clerks who actually work sixteen (16) weeks or more in any academic year are not casual employees for the purposes of R.I.G.L. 28-9.4 et seq.

Having determined that some of the substitute clerks are casual and not eligible for collective bargaining, and that some of the long-term substitute clerks are eligible for collective bargaining, the Board's next inquiry is whether the long-term substitute clerks share a community of interest sufficient to form the proposed bargaining unit.

#### COMMUNITY OF INTEREST

A union may be certified as the bargaining representative of a group of employees only if those employees constitute an appropriate bargaining unit. In determining whether a proposed

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<sup>2</sup> The concept of long-term substitutes becoming entitled to protections and benefits of collective bargaining is certainly not foreign to the educational setting. Most teacher contracts have a provision that grants various benefits to long-term substitutes, after a certain number of days of work.

bargaining unit is appropriate, the general inquiry made by the Board is whether or not the employees share a “community of interest.” Factors to determine that a community of interest exists are:

- 1) Similarity in scale and manner of determining earnings;
- 2) Similarity of employment benefits, hours of work, and other terms and conditions of employment;
- 3) Similarity in the kind of work performed;
- 4) Similarity in the qualifications, skills and training of the employees;
- 5) Frequency of contact or interchange among employees;
- 6) Geographic proximity;
- 7) Continuity or integration of the production process;
- 8) Common supervision and determination of labor relations policy;
- 9) Relationship to the administrative organization of the employer;
- 10) History of collective bargaining;
- 11) Desires of the affected employees;
- 12) Extent of union organization.

N.L.R.B. v. Saint Francis College, 562 F.2d 246, 249 (3d Cir. 1977) citing Robert A. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining*, 69 (1976), Rhode Island Public Telecommunications Authority v Rhode Island State Labor Relations Board, 650 A.2d 479 (R.I. 1994). No one of the above factors is dispositive of whether there exists a community of interest, and there is no requirement that all factors be present to establish a community of interest.

In this case, the testimony established that all the clerks make the same wage of \$7.65 per hour, with no benefits at all - no sick time, no holiday pay, no vacation pay, no retirement, no health insurance. (TR. p. 38) The clerks all do similar type office work – typing, filing, answering phones, and miscellaneous other duties. The clerks are all notified of openings for the school year, and assigned to their work rotation by Charlene Villa, the Chief Clerk of the Department. The clerks all work in similar physical settings - offices in the City’s various schools. The substitute clerks work the same hours as the employees whom they are replacing and issues regarding labor relations are centralized in the Providence School Human Resources Department. (TR. p. 65) Many of the employees have worked continuously for several years. (TR. p. 8, 35, 43, 50) At the end of the school year, many of the employees are “laid off” for the summer, and receive letters verifying the lay-off status. (TR. p. 16) (Also, see Employer Exhibit #1) None of the employees presently enjoy any benefits. All the employees have the same, or similar, terms and conditions of employment. A substantial number of employees have showed an interest in being represented by a union. Thus, the Board finds that there exists a community

of interest among the substitute clerks, sufficient to include all the eligible substitute clerks within the same bargaining unit.

### **FINDINGS OF FACT**

- 1) The Respondent, Providence School Department, is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
- 2) RI Council 94, AFSCME, AFL-CIO is a labor organization, which exists and is constituted for the purpose, in whole or in part, of collective bargaining relative to wages, rates of pay, hours, working conditions and all other terms and conditions of employment, and of dealing with employers concerning grievances or other mutual aid and protection.
- 3) The Employer hires substitute clerks for three types of circumstances: (1) Special Projects: Temporary assignments to accomplish a specific task, such as a six (6) week project to update files; (2) Vacancies: - To fill job openings which occur as a result of the posting, bidding, and recruitment process; (3) Absences: - To fill in and provide coverage for regular employees who are absent for whatever reason - illnesses, bereavement leave, maternity leaves, worker's compensation leave, or for other reasons.
- 4) All the clerks make the same wage of \$7.65 per hour, with no benefits at all - no sick time, no, holiday pay, no vacation pay, no retirement, no health insurance. The clerks all do similar type office work - typing, filing, answering phones and miscellaneous other duties.
- 5) The duration of each particular substitute clerk assignment varies with the nature of the type of absence, although many are of a significant length of time. The clerks are all notified of openings for the school year, and assigned to their work rotation by Charlene Villa, the Chief Clerk of the Department.
- 6) The clerks all work in similar physical settings - offices in the City's various schools. The substitute clerks work the same hours as the employees whom they are replacing and issues regarding labor relations are centralized in the Providence School Human Resources Department.
- 7) Most of the substitute clerks work a 25-40 hour work week, five (5) days per week. If they take a day off for any reason, they receive no pay.
- 8) Many of the employees are "10-month employees," who are hired for a 10 month period to work on an as needed basis. Many employees have worked continuously for several years.

At the end of the school year, many of the employees are “laid off” for the summer, and receive letters verifying the lay-off status.

- 9) A substantial number of employees have showed an interest in being represented by a union.

#### **CONCLUSIONS OF LAW**

- 1) Employees who have worked as substitute clerks just for a two (2) – four (4) week period at the beginning of the academic year, and employees who have worked periodically throughout the year, for a combined total of less than sixteen (16) weeks are fairly characterized as “casual employees;” and, thus, are excluded from collective bargaining.
- 2) Employees who have worked either continuously or periodically throughout an academic year, for a period of sixteen (16) weeks or more, have ceased to be “casual” employees and are more accurately described as long-term floaters.
- 3) The eligible members of the proposed bargaining unit share a sufficient community of interest to form an appropriate bargaining unit.

#### **DIRECTION OF ELECTION**

By virtue of, and pursuant to, the power vested in the Rhode Island State Labor Relations Board by the Rhode Island State Labor Relations Act, it is hereby:

**DIRECTED**, that an election by secret ballot shall be conducted within forty- five (45) days hereafter, under the supervision of the Board or its agents, at a time, place and during hours to be fixed by the Board among the Substitute Clerks of the Providence School Department, who have worked for sixteen (16) or more weeks for the 2002-2003 academic year, as of the date of this order, to determine whether they wish to be represented, for the purposes of collective bargaining, as provided for in the Act, by RI Council 94, AFSCME, AFL-CIO or by no labor organization.

RHODE ISLAND STATE LABOR RELATIONS BOARD

*Walter J. Lanni*

Walter J. Lanni, Chairman

*Frank J. Montanaro*

Frank J. Montanaro, Member

*Joseph V. Mulvey*

Joseph V. Mulvey, Member

*Gerald S. Goldstein*

Gerald S. Goldstein, Member

*Ellen L. Jordan*

Ellen L. Jordan, Member

*John R. Capobianco*

John R. Capobianco, Member

*Elizabeth S. Dolan*

Elizabeth S. Dolan, Member

Entered as an Order of the  
Rhode Island State Labor Relations Board

Dated: May 14, 2003

By: *Joan N. Brousseau*  
Joan N. Brousseau, Administrator